A

Hii Chie Ping & Anor v Public Prosecutor

B HIGH COURT (SIBU) — CRIMINAL APPEAL NOS SBW-42–1/12 OF 2015, SBW-42–1/1 OF 2016, SBW-41–1/1 OF 2016, SBW-41–2/1 OF 2016, SBW-41–3/1 OF 2016, SBW-41–4/1 OF 2016 AND SBW-41–5/1 OF 2016

ALWI ABDUL WAHAB JC

4 NOVEMBER 2016

C

Criminal Procedure — Appeal — Appeal against conviction and sentence — Whether there were valid grounds to warrant interference of court into findings of fact and law by sessions court judge — Whether sessions court misdirected himself — Penal Code

D

This was an appeal against the decision of the sessions court judge whereby the appellants were found guilty and were convicted and sentenced to several offences, namely, abduction, wrongful secret confinement, assault and voluntarily causing hurt of PW16. Initially there were eight accused persons before the Sessions Court in Sibu, with various charges. They were later acquitted and discharged of all the offences charged. The prosecution later appealed to the High Court where the judge allowed the appealed and directed the first, second, fifth, sixth and eighth appellants to enter their defence in the sessions court where the appellants were found guilty and later convicted and sentenced. In his decision, the learned sessions court judge stated, inter alia, that the credibility of PW1, PW16 and PW19 were no longer an issue because the other High Court had called for the defence to be entered. Dissatisfied with the decision, the appellants filed the present appeal. The crux of the prosecution's case was that the offences for which the appellants were charged were due to business failure between PW16 and the fifth appellant.

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Held, allowing the appeal and setting aside conviction and sentence:

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(1) There were valid grounds to warrant the interference of the court into the findings of facts and laws by the sessions court judge. The other High Court's decision in calling for defence was no bar for the learned sessions court judge to re-evaluate or re-assess the prosecution's evidence at the conclusion of the defence case. The sessions court judge had committed a clear misdirection when he failed to re-evaluate and re-assess all the evidence before him. The appellants were prejudiced and were deprived of a reasonable and fair chance of being acquitted due to the failure of the sessions court judge to gauge the whole evidence at the close of the defence case (see paras 18–19, 21 & 30).

I

(2) The sessions court judge had misdirected himself when he brushed aside the appellant's defence regarding the involvement of PW16 in a fight as an afterthought. There was no recovery of physical evidence of items that was stated in the charges and nobody was called to testify on the ownership of the items alleged to have been robbed by the appellants. With regards to the defence of alibi, the prosecution should have produced and retrieved the data and call logs for mobile phones of both the fifth appellant and the fourth accused to establish that there was communication between them. Besides that, PW17, the doctor who prepared PW16's the medical report, made no observation of serious injuries on the PW16's body contrary to his allegation with being inflicted with numerous injuries on parts of his body (see paras 33, 37–38 & 41).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan hakim mahkamah sesyen di mana perayu-perayu didapati bersalah dan disabitkan dan dijatuhkan hukuman kepada beberapa kesalahan, iaitu, penculikan, pengurungan rahsia yang salah, serangan dan secara sukarela menyebabkan kecederaan terhadap PW16. Pada mulanya terdapat lapan orang tertuduh di hadapan Mahkamah Sesyen Sibu, dengan pelbagai tuduhan. Mereka kemudiannya dibebaskan dan dilepaskan terhadap kesemua kesalahan yang dituduh. Pihak pendakwaan kemudiannya merayu kepada Mahkamah Tinggi di mana hakim membenarkan rayuan dan mengarahkan perayu-perayu pertama, kedua, kelima, keenam dan kelapan untuk memasukkan pembelaan mereka di mahkamah sesyen di mana perayu-perayu didapati bersalah dan kemudiannya disabitkan dan dijatuhkan hukuman. Hakim mahkamah sesyen yang bijaksana di dalam keputusannya menyatakan, antara lain, bahawa kredibiliti PW1, PW16 dan PW19 bukan lagi isu kerana Mahkamah Tinggi yang satu lagi telah memanggil untuk pembelaan dimasukkan. Tidak puas hati dengan keputusan, perayu-perayu memfailkan rayuan ini. Teras utama kes pihak pendakwaan adalah bahawa kesalahan-kesalahan yang mana perayu-perayu dituduh adalah akibat kepada kegagalan perniagaan di antara PW16 dan perayu kelima.

Diputuskan, membenarkan rayuan dan mengetepikan sabitan dan hukuman:

(1) Terdapat alasan sah untuk mewajarkan campur tangan mahkamah dalam dapatan fakta dan undang-undang oleh hakim mahkamah sesyen. Keputusan Mahkamah Tinggi satu lagi dalam memanggil pembelaan bukan halangan untuk hakim mahkamah sesyen yang bijaksana untuk menilai semula atau menaksir semula keterangan pihak pendakwaan di akhir kes pembelaan. Hakim mahkamah sesyen telah melakukan salah arah jelas apabila belaiu gagal untuk menilai semula dan menaksir semula kesemua keterangan di hadapannya. Perayu-perayu diprejudis dan dinafikan terhadap peluang munasabah dan adil untuk dibebaskan

akibat kegagalan hakim mahkamah sesyen untuk mengukur keseluruhan keterangan di akhir kes pembelaan (lihat perenggan 18–19, 21 & 30).

(2) Hakim mahkamah sesyen telah salah arah dirinya apabila beliau tidak mengendahkan pembelaan perayu-perayu berkaitan penglibatan PW16 di dalam pergaduhan sebagai sesuatu yang difikirkan kemudian. Tidak terdapat penemuan keterangan fizikal terhadap barang-barang yang dinyatakan di dalam tuduhan-tuduhan dan tiada siapa pun dipanggil untukk memberi keterangan ke atas pemilikan terhadap barang-barang yang didakwa dicuri oleh perayu-perayu. Berkaitan kepada pembelaan alibi, pihak pendakwaan patut mengemukakan dan mendapatkan data dan kesemua log panggilan bagi telefon bimbit kedua-dua perayu kelima dan tertuduh keempat untuk membuktikan bahawa terdapat komunikasi di antara mereka. Selain daripada itu, PW17, doktor yang menyediakan laporan kesihatan PW16, tidak membuat pemerhatian mengenai kecederaan serius ke atas tubuh badan PW16 bertentangan kepada dakwaannya mengalami banyak kecederaan pada bahagian tubuh badannya (lihat perenggan 33, 37–38 & 41).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 321–500.

Cases referred to

Nguyen Quoc Viet v PP [2016] 2 MLJ 106; [2016] 1 CLJ 365, HC (refd)
Norman bin Ismail v PP [2014] 2 MLJ 311, CA (refd)
Prasit Punyang v PP [2014] 4 MLJ 282; [2014] 7 CLJ 392, HC (refd)
Saad bin Abas & Anor v PP [1999] 1 MLJ 129, CA (refd)
Songsil Udtoom & Ors v PP [2016] 1 MLJ 41; [2016] 1 CLJ 39, CA (refd)

Legislation referred to

Criminal Procedure Code ss 173(m)(i), 182A(1)

David HP Kuok (Wong, Orlando Chua & Kuok Advocates) for the first, second and sixth appellants.
Shankar Ram (Thomas Shankar Ram & Co Advocates); Orlando Chua (Wong, Orlando Chua & Kuok Advocates) for the fifth appellant.
Shankar Ram (Thomas Shankar Ram & Co Advocates); Augustine Liom (Tang & Co Advocates) for the eighth appellant.
Robert Pasang Alam (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Alwi Abdul Wahab JC:

INTRODUCTION

[1] By way of background, there were eight accused persons being arraigned before the Sessions Court at Sibu, Sarawak with several charges. The eight accused persons were as follows:

1.	Wong Kong Yew	(first appellant)
2.	Hii Chie Ping	(second appellant)
3.	Matthew Soon Chan Chin	(third accused)
4.	Wee Teck Hong	(fourth accused)
5.	Wong Leh Ying	(fifth appellant)
6.	Yong King Lung	(sixth appellant)
7.	Yong Kie Teck	(seventh accused)
8.	Lau Ang Ho	(eighth appellant)

[2] All the first, second, fifth, sixth, eighth appellant, third, fourth and seventh accused claimed trial to those charges and at the end of the case for the prosecution, they were acquitted and discharged of all the offences charged. The prosecution then appealed to the High Court before His Lordship Lee Heng Cheong J against such decision given by the learned sessions court judge.

[3] At the hearing of the appeal before the High Court, the third, fourth and seventh accused could not be served with notices of hearing as their whereabouts were unknown and accordingly the court proceeded with the hearing of the appeal against the remaining accused persons/appellants ie the first, second, fifth, sixth and eighth appellants.

[4] Upon hearing the appeal, His Lordship Lee Heng Cheong J allowed it and directed the first, second, fifth, sixth and eighth appellants to enter into their defence in the sessions court. The case resumed in the sessions court where all the first, second, fifth, sixth and eighth appellants gave their sworn evidence. No other witnesses were called by the first, second, fifth, sixth and eighth appellants at the case for the defence.

[5] On 22 December 2015, at the conclusion of the trial, the learned sessions court judge found all the appellants guilty, convicted them on the respective offences and sentenced them accordingly. Dissatisfied with this decision, the first, second, fifth, sixth and eighth appellants appealed before me against their conviction and sentence.

[6] For this appeal, the first, second and sixth appellants were represented by Mr David Kuok, the fifth appellant was represented by Mr Shankar Ram and

Mr Orlando Chua while the eighth appellant was represented by Mr Shankar Ram and Mr Augustine Liom.

[7] On the 4 November 2016, I allowed the appeal, set aside the order of conviction and sentence. The prosecution appealed and I now give my reasons.

THE CHARGES

[8] As against the second appellant, third accused and fourth accused, the re-amended charge under Criminal Trial No SC-62–68 of 2007 marked ('A') against them reads as follows:

RE-AMENDED CHARGE (A)

That you together with another who is still at large, on 7th February 2007 at about 9.00 a.m. at No 24D, Jalan Laichee, Sibu, in the District of Sibu, in the State of Sarawak, in furtherance of the common intention of you all, had committed extortion on one *Kueh Chiow Huat (NRIC: 770909-13-5937)* by putting the said *Kueh Chiow Huat* in fear of instant death or of instant hurt or of wrongful restraint, and you were in the presence of the said *Kueh Chiow Huat* at the time of committing extortion and induced the said *Kueh Chiow Huat* then and there to deliver up, to wit, one lorry bearing the registration number QSM 423, the property of Sri Rejang Contractor, and that you have thereby committed the offence of robbery underSection 392 of the Penal Code read with Section 34 of the same Code.

[9] As against the first, second appellants, third accused, and fourth accused, the amended charge under *Criminal Trial No SC-62–69 of 2007* marked ('B') reads as follows:

AMENDED CHARGE (B)

That you together with 10 others who are still at large on 9th February 2007 at about 3.00 p.m. at No 7A, Jalan Sawi, Sibu, in the District of Sibu, in the State of Sarawak, had committed gang robbery, to wit, items as in *Appendix 'B'* properties of one Kueh Chiow Lee (NRIC: 790624-13-5739), and that you have thereby committed an offence underSection 395 of the Penal Code read with Section 391 *of the same Code.*

'APPENDIX 'B"

1. 1 unit of air-conditioner by the brand of LG
2. 1 unit of TV by the brand of Sony
3. 1 unit of washing machine by the brand of Singer
4. 1 set of Woofer
5. 1 unit of equalizer
6. 1 unit of DVD player

7. 1 unit of exercise machine
8. 1 unit of exercise bicycle
9. 1 set of computer desktop by the brand of Sony
10. 1 unit of refrigerator by the brand of Singer
11. 2 units of speakers
12. 1 unit of wooden table
13. 10 units of plastic chairs
14. 1 unit of sofa
15. 1 unit of kitchen cabinet.

[10] As against the fourth accused, the re-amended charge under Criminal Trial No 1–81–04 of 2007 marked ('C') reads as follows:

RE-AMENDED CHARGE (C)

That you together with 4 others who are still at large, between 11th February 2007 at about 8.00 p.m. and 24th February 2007 at about 1.00 p.m. at No 24D, Jalan Laichee, Sibu, in the District of Sibu, in the State of Sarawak, in furtherance of the common intention of you all, wrongfully confined one *Kueh Chiow Huat* (NRIC: 770909-13-5937) for 14 days, and that you have thereby committed an offence under Section 344 of the Penal Code read with Section 34 of the same Code.

[11] As against the fifth appellant, the re-amended charge under *Criminal Trial No 2–81–05 of 2007* marked ('D') reads as follows:

RE-AMENDED CHARGE (D)

That you between 6th February 2007 at about 7.00 p.m. and 11th February 2007 at about 1.00 p.m., in the District of Sibu, in the State of Sarawak abetted:

1. Hii Chie Ping (NRIC: 720706-13-5675)
2. Matthew Soong Chan Chin (NRIC: 750731-13-5703
3. Wee Teck Hong (NRIC: 670924-13-5793)
4. Wong Kong Yew (NRIC: 770910-13-5993)
5. Lau Ang Ho (NRIC: 770107-13-5329)
6. Yong King Lung (NRIC: 850313-13-5557)
7. Yong Kie Teck (NRIC: 700803-13-5935)

and 22 others who are still at large, in the commission of abducting of one Kueh Chiow Huat (NRIC: 770909-13-5937) with intent to cause the said Kueh Chiow Huat to be secretly and wrongfully confined at several places, to wit, [1] No 7A, Jalan Sawi, Sibu [2] No 4B, Lane 18B, Jalan Deshon, Sibu, [3] No 2A, Lane 26,

Jalan Tiong Hua, Sibu and [4] No 44, Lane 2, Rejang Park, Sibu, which offence was committed in consequence of your abetment, and that you have thereby committed an offence under Section 109 of the Penal Code read with Section 365 of the same Code.

[12] As against the first, second, sixth, eighth appellants, third, fourth, and seventh accused, the re-amended charge under *Criminal Trial No 3–81–06 of 2007* against them marked ('E') reads as follows:

RE-AMENDED CHARGE (E)

That you, between 6th February 2007 at about 7.00 p.m. and 11th February 2007 at about 1.00 p.m., in the District of Sibu, in the State of Sarawak, in furtherance of the common intention of you all, had abducted one *Kueh Chiow Huat* (NRIC: 770909-13-5937) with intent to cause the said *Kueh Chiow Huat* to be secretly and wrongfully confined at several places, to wit, [1] No 7A, Jalan Sawi, Sibu [2] No 4B, Lane 18B, Jalan Deshon, Sibu, [3] No. 2A, Lane 26, Jalan Tiong Hua, Sibu and [4] No 44, Lane 2, Rejang Park, Sibu, and that you have thereby committed an offence under Section 365 of the Penal Code read with Section 34 of the same Code.

[13] In respect of the eighth appellant, the amended charge under *Criminal Trial No 2–83–294 of 2007* marked ('F') against him reads as follows:

AMENDED CHARGE (F)

That you on 11th February 2007 at about 3.00 p.m. at No 4B, Lane 18B, Jalan Deshon, Sibu, in the District of Sibu, in the State of Sarawak had voluntarily caused hurt to one Kueh Thoo Yong (NRIC: 450503-13-5309), and you have thereby committed an offence under Section 323 of the Penal Code.

[14] As against the first and second appellants, third and fourth accused, the amended charge under *Criminal Trial No 2–83–295 of 2007* marked ('G') reads as follows:

AMENDED CHARGE (G)

That you, together with 20 others who are still at large, between 6th February 2007 at about 7.00 p.m. and 9th February 2007 at about 6.00 p.m. at several places, to wit, [1] No 7A, Jalan Sawi, Sibu [2] No 4B, Lane 18B, Jalan Deshon, Sibu, [3] No 2A, Lane 26, Jalan Tiong Hua, Sibu [4] Osaka Restaurant, Jalan Pahlawan, Sibu, [5] coffee shop at Jalan Pahlawan, Sibu, in the District of Sibu, in the State of Sarawak, in furtherance of the common intention of you all, had voluntarily caused grievous hurt to one Kueh Chiow Huat (NRIC: 770909-13-5937), and that you have thereby committed an offence under Section 325 of the Penal Code read with Section 34 of the same Code.

[15] As against the first, second, sixth, eighth appellants, third, fourth and seventh accused, an amended charge under *Criminal Trial No 2–83–296 of 2007* marked ('H') reads as follows:

AMENDED CHARGE (H)

That you, together with 10 others who are still at large, on between 10th February 2007 at about 6.00 p.m. and 11th February 2007 at about 7.00 p.m. at No 4B, Lane 18B, Jalan Deshon, Sibu, in the District of Sibu, in the State of Sarawak, in furtherance of the common intention of you all, had voluntarily caused hurt to one Kueh Chiow Huat (NRIC: 770909-13-5937) by means of instruments for stabbing or cutting which used as weapon of an offence is likely to cause death, to wit, wood, an iron rod, cockfighting spur, hammer, knife and rattan and heated substance, to wit, a mosquito racquet and a cigarette butt, which is deleterious to the human body to swallow, and you have thereby committed an offence under Section 324 of the Penal Code read together with Section 34 of the same Code.

[16] All the above eight charges were heard and tried together in the sessions court. In respect of the amended charge marked 'G', both learned counsel for the sixth and eighth appellant contended that the conviction and sentence of both the sixth and eighth appellant were erroneously entered as they were not even charged for the offence in the first place. The learned deputy public prosecutor agreed with learned counsel that the conviction and sentence in respect of both the sixth and eighth appellant for the amended charge marked 'G' ought to be set aside which I hereby so order.

[17] The crux of the prosecution's case was that the offences for which the appellants were charged with were due to business failure between Kueh Chiow Huat ('PW16') and the fifth appellant ('Wong Leh Yin'), who had pumped in almost half a million into the business, to sell and control gas-filled cylinder. The fifth appellant had to recover the losses by all means from PW16 through a series of criminal acts committed by the other appellants namely abduction, wrongful secret confinement and assault of PW16 at several places between 6 November 2007. PW16's family was not spared from these criminal acts of the appellants as his father named Kueh Thoo Yong ('PW1') was also assaulted and his brother's (Kueh Chiow Lee — PW19) personal effects were robbed and taken away from his possession.

THE COURT'S FINDINGS

[18] Upon perusing the voluminous appeal records and the lengthy submissions, I find that there were valid grounds to warrant this court's interference into the findings of facts and laws by the learned sessions court judge in this present appeal.

[19] Reading through the judgment given by the learned sessions court judge at the conclusion of trial, there was a clear misdirection committed by the learned sessions court judge that he had failed to re-evaluate and re-assess all the evidence before him including the evidence adduced at the end of the

prosecution case in breach of s 173(m)(i) of the Criminal Procedure Code ('the CPC').

[20] When the other High Court ruled that the appellants here must enter their defence after the appeal by the prosecution against their discharged and acquittal at the end of the prosecution case, it is as good as saying that the learned sessions court judge himself had decided to call for the defence as decided in the case of *Saad bin Abas & Anor v Public Prosecutor* [1999] 1 MLJ 129.

[21] However, in my view it is not correct for the learned sessions court judge to have stated in his decision at the end of the trial that the credibility of PW1, PW16 and PW19 were no longer an issue simply because the other High Court (the appeal before Lee Heng Cheong J) had called for the defence to be entered in view of the strict requirement of the law that he is obliged to re-look and review all evidence before him including the evidence adduced at the close of the prosecution case. In other words, it means that the other High Court's decision in calling for defence is no bar for the learned sessions court judge to re-evaluate or re-assess the prosecution's evidence at the conclusion of the defence case.

[22] There are a host of authorities which deal with the correct approach for the court to take at the end of the defence case pursuant to s 173(m)(i) of the CPC which is similar to s 182A(1) of the CPC for the trial in the High Court (see *Prasit Punyang v Public Prosecutor* [2014] 4 MLJ 282; [2014] 7 CLJ 392; *Songsil Udtoom & Ors v Public Prosecutor* [2016] 1 MLJ 41; [2016] 1 CLJ 39; and *Nguyen Quoc Viet v Public Prosecutor* [2016] 2 MLJ 106; [2016] 1 CLJ 365). It was held in the above cases that the duty of the court at the conclusion of the trial is to re-evaluate all the evidence adduced in the course of the hearing, inclusive of that adduced by the prosecution and to decide whether the prosecution has proved its case beyond reasonable doubt.

[23] It was stated authoritatively by the Court of Appeal in *Norman bin Ismail v Public Prosecutor* [2014] 2 MLJ 311 on what should be the right approach to take by the trial court when the defence is called by the higher court on appeal. It was held as follows:

> The complaint by the appellant was that the learned judicial commissioner had erred in His Lordship's approach in rejecting the appellant's claim of lack of knowledge on the basis that the Court of Appeal had, in ordering the appellant to enter his defence, held that a prima facie case had been proven against the appellant, hence the issue of knowledge does not arise at the defence case. It is the duty of the defence to rebut the element of knowledge and the court is incumbent to re-evaluate all the evidence adduced in the course of the hearing, inclusive of that adduced by the prosecution.

[24] In the present appeal, the learned sessions court judge in his judgment seemed to deal only with the evidence adduced at the defence stage and totally ignored about his findings of facts and law at the prosecution's case especially on the credibility of PW1, PW16 and PW19 where he found that their evidence were riddled with serious flaws and inconsistencies which led to the impeachment of the credibility of the prosecution star witness ie PW16 at the end of prosecution's case.

[25] For ease of reference, the learned sessions court judge's decision at the end of the prosecution case is reproduced as follows:

> In this case, PW16 alleged that he had been struck numerous times using a rattan the size of his pinky and three feet long. lt was however never recovered. But he claimed in his evidence that the force used to strike him using the rattan was so strong that it split. There was no medical evidence to reveal the stripes on his body nor were there any scars found on his body due to the alleged beating using the rattan.
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> PW16 further alleged that an electric mosquito killer racquet was used to torture him. He claimed that he was asked to thread all his five fingers through it which caused them to be electrocuted. And it was also alleged that he was forced to do it 10–20 times. No such racquet was ever found. ('PW17') Dr Lau Sie Teck was cross examined on this, but he did not see any burnt marks on PW16's fingers. Either PW16 did not mention it or PW16 could not remember. Nevertheless, his medical report in exh P45 showed no burnt marks.
>
> PW16 went on to allege that lighted cigarette was extinguished on his tongue. On top of that it was pressed unto it. In view of his testimony on this point, the defence pitted him against his father on why his father never mentioned about fingers being used to hold the tongue. He was then asked who was lying about it. He said that, it was his father.
>
> In any event, PW17 had given evidence that there were no injuries to the tongue. Indeed he appeared skeptical and/or suspicious of PW16's contention. He then said that even if there were injuries to PW16's tongue, it would not have been severe resulting in a long term side effect. This caused the defence to question PW16's inability to speak loud at the trial. lt must be remembered that he claimed to be not able to speak loud due to the injury to his tongue.
>
> It was also alleged that the eighth accused had used a hammer to strike at PW16's palms. PW16 was seated with both his palms facing downwards and resting on his knees. lt was observed from PW16 description that the eighth accused had raised the hammer up to his head level and struck the back of his hands with all his might.
>
> Again, PW17 revealed that he did not observe any injuries to the back of PW16's hands. For that reason it was not reflected in exh P45. PW17 opined that should the incident as described had happened, multiple fractures to the back of PW16's hand would have resulted. PW16 had also claimed that other parts of his body including his ankle were struck using hammer. Yet again no evidence of fractures could be found.

A With these in mind, this court had found that PW16's testimony on how he was allegedly struck with rattan, allegedly electrocuted with a mosquito killer racquet, allegedly burnt on his tongue by means of a burning cigarette, threatened with a cock-fighting spur to be far-fetched. His oral testimonies regarding his injuries and their causes could not be reconciled with the available medical evidence by PW17, B PW21, Dr Henry Toh and Dr Anderson Steven.

Mindful of the authorities referred to earlier, whilst the court found that a single word, 'mempelawa', in PW16's s 112 statement differed greatly with his oral testimony, where he alleged that he was threatened, induced or forced by the fifth accused to be in the gas joint venture business, it was not sufficient for the court to C impeach his credit.

However, having considered the glaring inconsistencies, contradictions including the incredible description about the manner and mode of assault on him, it was either because he was exaggerating or he was lying; not on one or two occasions, but numerous occasions, judging from his descriptions of the alleged assaults.

D

It must be borne in mind that he could not explain why the two doctors had recorded his history that he was involved in a fight. His mother was not called to explain. His father, PW1 clearly went against his own testimony that he had witnessed how PW16 was treated.

E In view of the above, there could only be one conclusion and that is PW16's credit ought to be impeached. lt is so impeached and 'his evidence no longer constituted any part of the prosecution case'. (*Public Prosecutor v Munusamy*). It therefore follows that, PW1 and PW19 testimonies 'must be scrutinized with great care and indeed with suspicion'. (*Khoon Chye Hin v Public Prosecutor*).

F (pp 2429–2430; pp 2432–2435 of the records of appeal, Vol 13).

[26] At the conclusion of the trial, the learned sessions court judge then made the following remarks:

G This court had duly considered other lines of defence as well as submissions from learned counsel to disregard the evidence of PW16 as well as that of PW1 and PW19, however, it must be remembered that the defence was called after the High Court had made the ruling.

This court had earlier on during the prosecution case impeached the testimony of H PW16 and because of that PW1 and PW19 testimonies could not be corroborated. However, in view of the ruling of the High Court in calling for the five accuseds to enter their defence, the issue of the credibility of PW1, PW16 and PW19 are no longer an issue.

(pp 2753–2754 of the records of appeal, Vol 14).

I

[27] Based on the learned sessions court judge's own finding of facts on the credibility and demeanour of PW1, PW16 and PW19, and the subsequent impeachment of PW16 at the end of the prosecution's case, he would have found that the credibility of PW1, PW16 and PW19 were indeed an issue in

deciding whether or not the prosecution had proved its case beyond reasonable doubt at the conclusion of the trial if not for the misconception of the application of the law by the learned sessions court judge after the High Court ordered the appellants to enter their defence.

[28] The learned sessions court judge should re-examine the evidence of the prosecution's witnesses as required by the law at the conclusion of the trial and if there was a sudden change of direction at the defence stage as in the present appeal, he must be able to give reasons why he took such course of action after finding that there were big gaps at the end of the prosecution case. It is incumbent for the learned sessions court judge to reconcile his findings at the conclusion of the prosecution's case as he examined the defence evidence otherwise in the final analysis, his decision could not sustain due to the incongruity.

[29] Had the learned sessions court judge put his mind adequately and re-evaluate the evidence of the prosecution's witnesses objectively, even after the defence stage, he would have found that there remain serious infirmities and contradictions in the prosecution's case.

[30] In my view, the failure by the learned sessions court judge to gauge the whole evidence at the close of the defence case had prejudiced and deprived the appellants of a reasonable and fair chance of being acquitted. This non-direction amounts to a misdirection which would render the appellants' conviction unsafe and unsatisfactory.

[31] On this ground alone, I had allowed the appeal, quashed the conviction and set aside the sentence against all the appellants on the respective charges preferred against them. The first, second, fifth, sixth and eighth appellants were accordingly discharged and acquitted.

[32] There were other grounds why I allowed the appeal but for the purpose of this judgment, I would only outline them in brief.

[33] The learned sessions court judge had misdirected himself when he just brushed aside the appellants' defence regarding the involvement of PW16 in a fight as an afterthought. His finding runs counter with the evidence adduced during the prosecution's case that PW16's parents had informed both Dr Henry Toh and Dr Anderson Steven that PW16 sustained injuries due to a fight. The medical notes ie exhs D5 and D6 written by both the medical doctors had confirmed the same.

[34] Both Dr Henry Toh and Dr Anderson Steven were not called by the prosecution otherwise they would be able to unfold the narrative of the

prosecution's case in particular the injuries sustained by PW16. By not calling these two doctors to explain and clarify what they have stated in exhs D5 and D6, it must be taken to mean that the contents therein were not challenged that the cause of PW16's injuries was due to a fight and not as a result of serious beating by the appellants as alleged.

[35] The prosecution also did not call one Lim Kam Soon (Ah Pao) and his wife who were present at the fourth accused's (Wee Teck Hong @ Ah Lek) house where PW16 was allegedly assaulted on 11 February 2007.

[36] The prosecution had through its own witness ie the investigating officer ('PW20') testified that the debt matter between PW16 and the fifth appellant had been settled prior to 6 February 2007 where it was agreed between them that PW16 would be making payment in the sum of RM10,000 per month from the income generated from PW16's own gas business. This testimony has dispelled the prosecution's contention that the motive behind the appellants' action was due to the debt problems that PW16 had with the fifth appellant.

[37] All the physical evidence of the items as stated in the charges including one big lorry were not recovered and no one was called to testify on the ownership of these items alleged to have been robbed by the appellants. The co-owner of the robbed items Wong Yeu Hui @ Ang Kau ('PW13') who was also PW19's housemate testified that he did not believe everything that PW19 said to him and agreed to the suggestion by the defence counsel in cross-examination that PW19's alleged robbery of the items could be a ploy by PW19 to deprive him of those items.

[38] The prosecution's case was that the fifth appellant ie Wong Leh Yin @ Lee Long was the main character who had instigated the rest of the appellants to commit these series of criminal acts. In his defence, the fifth appellant produced his international passport (exhs D8 and D8 (A)) to show that he was away overseas in the Philippines from 7–10 February 2007 which means that he could not have made or receive the alleged phone calls to direct the fourth accused ie Wee Teck Hong @ Ah Lek to abduct, secretly and wrongfully confine PW16. In the light of the defence of alibi which was put to the prosecution, the prosecution should have produced and retrieved the mobile phones' data and call logs of both the fifth appellant and the fourth accused to prove that there were indeed such communications between them during such period.

[39] From the evidence adduced at the trial, the four different places where PW16 was allegedly kept cannot be considered as secretly and wrongly confined place as these places were either known to PW16 or PW1 and PW19. The exact whereabouts of PW16 were never made a secret to anyone at all.

Further, both PW1 and PW19 also knew the identity of PW16's captors headed by the fourth accused during the period from 6 February 2007 to 1 February 2007.

[40] The evidence of PW1 ie Kueh Thoo Yong (PW16's father) that he had been inflicted with a hard head-butt by eighth appellant ie Lau Ang Ho causing him injuries was not supported and clashed with the medical evidence of Dr Peter Lau Sie Teck ('PW17') who testified that PW1's injuries were truly superficial soft tissue injuries and they were not visible as shown in exh P12 (A and B). It must also be noted that the violent act allegedly committed by the eighth appellant on the 11 February 2007 was only reported to the police 13 days later vide exh P13.

[41] The same doctor PW17 who prepared the medical report of PW16 (exh P45) made no observation of any serious injuries eg burn marks or scars or fractures on PW16's fingers, hands and tongue contrary to PW16's allegation of being inflicted with numerous weapons on that parts of his body.

[42] Based on the above reasons coupled with the main reason on the misapplication of the law by the learned sessions court judge, the conviction and sentence on the appellants cannot therefore stand and liable to be set aside. Hence, this appeal is allowed.

Appeal allowed; conviction and sentence set aside.

Reported by Fatin Mohd Ismail